89-1868

No. 90 -

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

JOHN CALLEN,

Respondent

v.

OULO O/Y and OY FINNLINES, Ltd.,

Petitioners

On Writ of Certiorari
to the United States Court of
Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

Carl D. Buchholz, III
RAWLE & HENDERSON
Attorneys for Petitioners
Oulo O/Y and OY Finnlines, Ltd.
211 South Broad Street
Philadelphia, PA 19107
(215) 875-4000

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals for the Third Circuit err by affirming the judgment of district court which held that a shipowner had a duty to intervene in the cargo operations of an independent stevedoring contractor and take measures to prevent the possibility of harm to longshoremen arising from a condition on board the vessel, when the shipowner had already warned the stevedore-employer of the condition, and there was no evidence that the shipowner knew that the stevedore had failed to convey that warning to one of its longshoremen, or that the stevedore was otherwise proceeding to discharge the cargo in an obviously improvident manner?

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Petition for A Writ of Certiorari to the United States Court of Appeals for the Third Circuit

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Oulo O/Y and OY Finnlines, Ltd.[1], respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on January 29, 1990, rehearing denied on February 27, 1990, which affirmed, without opinion, the judgment of the United States District Court for the Eastern District of Pennsylvania that a shipowner had a duty to intervene in the cargo operations of an independent stevedoring contractor and take measures to prevent the possibility of harm to longshoremen arising from a condition on board the

1. Oulo O/Y and OY Finnlines, Ltd. are foreign corporations which are not publicly traded.

vessel, when the shipowner had already warned the stevedore-employer of the condition, and there was no evidence that the shipowner knew that the stevedore had failed to convey that warning to one of its longshoremen, or that the stevedore was otherwise proceeding to discharge the cargo in an obviously improvident manner, and in support thereof represent as follows:

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania is not officially reported and is reproduced in the Appendix hereto. (1a). The judgment of the United States Court of Appeals for the Third Circuit affirming the lower court decision, without opinion, is not officially reported and is reproduced in the Appendix hereto. (14a). The judgment of the United States Court of Appeals for the Third Circuit denying the Petition for Rehearing is also reproduced in the Appendix hereto. (16a).

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on January 29, 1990. The Petition for Rehearing was denied on February 20, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Longshore and Harbor Worker's Compensation Act, Section 5(b), 33 U.S.C. Section 905 (b)

> (b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title,

and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreement or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided by this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

LEGISLATIVE HISTORY INVOLVED

The Legislative History of the 1972 Amendments to the Longshore and Harbor Workers' Compensation Act, as set forth in House Report No. 92-1441, is reprinted in 1972 U.S. Cong. & Adm. News, Vol. 3, at 4698.

STATEMENT OF THE CASE

This lawsuit was originated by longshoreman, John Callen, to recover damages for personal injuries sustained on December 30, 1986, while working aboard the M/V POKKINEN, which was docked in the Port of Philadelphia. The jurisdiction of the district court was based upon 28 U.S.C. 1332, due to the diversity of

citizenship between the parties, and 28 U.S.C. Section 1331, as an action arising under the laws of the United States, namely, Section 5(b) of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C., Section 905(b).

Defendants, OULO O/Y and O/Y FINNLINES, owned and operated the M/V POKKINEN, an ocean-going cargo vessel. In December, 1986, the POKKINEN called at the Port of Philadelphia carrying a cargo of rolls of newsprint. The rolls of newsprint had been loaded aboard the POKKINEN by independent stevedoring contractors in Finland. As they had done on numerous prior occasions when their ships had called at the Port of Philadelphia, defendants hired Independent Pier Company, an independent stevedoring contractor, to discharge the newsprint from the vessel.

Plaintiff, John Callen, was a longshoreman employed by Independent Pier Company. Plaintiff Callen was injured while discharging the newsprint from the No. 3 cargo hold. The No. 3 cargo hold consisted of a 'tween deck (middle deck), and a lower hold. (2a). The hatch covers in the 'tween deck opened up in accordion-like fashion to permit access to the lower hold. (2a). In order to provide a means of ingress and egress for the longshoremen to climb into the lower hold when the 'tween deck hatch covers were opened, the manufacturer of the vessel designed and built a ladder into the surface of the 'tween deck hatch lids. The "ladder" was about 16 inches wide, with "rungs" that were 3 inches wide and 4 inches deep. When the 'tween deck hatch lids were closed, the "rungs" of the ladder were notches on the floor of the 'tween deck; when the hatch covers were opened, the notches became the "rungs" of a vertical ladder, permitting access to the lower hold. (2a).

The rolls of newsprint had been loaded in the 'tween deck by independent foreign stevedores in the customary manner; the rolls had been stowed on top of brown cardboard-like paper to protect the cargo from moisture,

oil, grease, etc., that may have accumulated on the 'tween deck. (3a).

On December 30, 1986, the POKKINEN docked at Pier 80, Philadelphia, and Independent Pier Company began discharging the cargo from the vessel at 8:00 a.m. Independent Pier Company employed several groups or gangs of longshoremen, including a gang headed by Joseph Micofsky. Micofsky's gang was assigned to discharge rolls of newsprint from the 'tween deck, No. 3 hatch. On this particular day, Micofsky was missing one of his regular gang members, so he hired plaintiff John Callen as a "pick-up", or temporary replacements to work in his gang. (2a).

As the longshoremen in Micofsky's gang discharged the rolls of newsprint from the 'tween deck, they picked up the brown cardboard-like paper that the rolls had been stowed on, thereby exposing portions of the 'tween deck. At approximately 10:30 a.m., plaintiff Callen and his co-workers were attempting to attach a piece of equipment, known as a cage, to several rolls of newsprint in order to discharge the rolls from the 'tween deck. (4a). Callen allegedly stepped backward with his right foot into one of the notches which formed the rungs of the ladder recessed into the 'tween deck hatch covers, injuring his ankle. (4a).

Callen testified that he was not aware of the "rungs" in the 'tween deck because they were covered with the brown paper. (3a). Callen also testified that before he started to work that day, he did not receive any warnings from the stevedore, its supervisors, or his gang boss about the presence of the ladder in the 'tween deck. (3a, 17a).

The POKKINEN and her sister ships, the VARJAKKA, FINN ARCTIS, and FINN FIGHTER, had all been serviced by Independent Pier Company, for a 10 to 15 year period prior to this accident. (19a). During that time, Independent Pier Company had become familiar with the design of these vessels, and the customary

manner in which rolls of newsprint were stowed. (18a-22a). Furthermore, the stevedore's foreman or "gang boss", Joseph Micofsky, admitted that during his ten years with Independent Pier Company, he had worked on board the POKKINEN and her sister ships, and had become very familiar with the design of the vessels, including the presence of the ladder in the 'tween deck covers. (20a). Micofsky also admitted that he was familiar with the customary manner of stowing the rolls of newsprint, including the custom of covering the recessed ladder with brown paper, (22a) and he warned his regular gang members of the presence of the rungs or notches of the ladder. (20a, 22a). However, Micofsky failed to give any warnings to plaintiff Callen, the temporary employee, because Micofsky assumed the regular members in the gang would convey the warning to Callen. (23a).

The defendants were unaware of the stevedore's malfeasance. The ship's crew did *not* know that Callen was a pick-up, and did *not* know he had not been warned of the "rungs" by his employer or supervisors. Defendants had never received any reports of prior accidents or complaints regarding the ladder in the 'tween deck. (24a-25a).

Following a non-jury trial, the district court issued its opinion, setting forth its Findings of Fact and Conclusions of Law. The district court found the vessel owner negligent, which negligence caused plaintiff's injuries. The court reasoned that the defendant shipowner had a duty to intervene and to take measures to prevent the possibility of harm to longshoremen arising from a condition on board the vessel, even though the shipowner had already warned the stevedore-employer of the condition, and there was no evidence that the shipowner knew that the stevedore had failed to convey that warning to one of its longshoremen or that the stevedore was otherwise proceeding to discharge the cargo in an obviously improvident manner. The district

court awarded damages in the sum of $226,508.00, with interest, and judgment was entered on April 7, 1989. (13a).

Defendants filed a timely appeal; argument was held on November 16, 1989. On January 29, 1990, the United States Court of Appeals for the Third Circuit entered a judgment, without opinion, which denied the appeal and affirmed the judgment of the United States District Court for the Eastern District of Pennsylvania in all respects. (14a). Defendant filed a timely Petition for Rehearing which was denied on February 27, 1990, with one judge in favor of rehearing. (16a).

REASONS WHY THE WRIT FOR CERTIORI SHOULD BE GRANTED

1. THE DECISION BELOW WHICH HELD THAT A SHIPOWNER CAN BE HELD LIABLE FOR FAILING TO WARN AN INDIVIDUAL LONGSHOREMAN ABOUT A DANGEROUS CONDITION KNOWN TO THE STEVEDORE-EMPLOYER IS IN CONFLICT WITH THE NINTH CIRCUIT'S DECISION IN BJARANSON v. BOTELHO SHIPPING CORP., 1989 A.M.C. 381 (9th Cir. 1988), AND THIS COURT'S OPINION IN SCINDIA STEAM NAVIGATION LTD. v. DeLOS SANTOS, 451 U.S. 156 (1981).

Longshoreman Callen's action against defendants OULU O/Y and O/Y FINNLINES, LTD. is governed by Section 5(b) of the 1972 Amendments to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 905(b), (hereinafter the Act), and the concept of negligence that has evolved under judicial interpretation of Section 5(b). *See e.g. Scindia Steam Navigation Ltd. v. De Los Santos,* 451 U.S. 156 (1981).

The history and purpose of the 1972 Amendments was detailed by this Court in *Scindia,* 451 U.S. at 165-167. Briefly summarized, the Act was intended to eliminate the shipowner's previous faultless liability to

longshoremen based on theories of unseaworthiness or a non-delegable duty to provide a safe place to work. *Id.* at 166; *see also Derr v. Kawasaki Kisen K.K.,* 835 F.2d 490 (3d Cir. 1987); *Rich v. U.S. Lines,* 596 F.2d 541 (3d Cir. 1978); *Hurst v. Triad Shipping Co.,* 544 F.2d 1237 (3d Cir. 1977).

Although Section 5(b) of the 1972 Amendments provided that the shipowner could only be held liable for its own negligence, Section 5(b) did not specify the acts or omissions of the shipowner that would constitute negligence. In *Scindia,* 451 U.S. 156 (1981), therefore, this Court addressed the issue of defining the standard of care which a shipowner owes to a longshoreman.

Scindia involved a suit by a longshoreman who alleged that he was injured as a result of the malfunctioning of the braking mechanism of a ship's crane. After reviewing the history and purpose of the 1972 Amendments, this Court concluded: (1) the shipowner could not be held liable for the negligence of an independent contractor such as a stevedore over which it exercises no operational control, *Id.* at 173; and (2) that prior to the start of work the shipowner owed a duty of reasonable care to longshoremen with regard to those physical parts of the vessel and its equipment over which the ship had operational control.

The Court specifically defined the shipowner's duty prior to the start of longshore operations as follows:

> This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by

> the stevedore in the course of his cargo operations and *that are not known by the stevedore* and would not be obvious to or anticipated by him if reasonably competent in the performance of his work . . . .

Scindia, 451 U.S. at 166-167 (1981) (emphasis added).

It is undisputed in the present case that the stevedore, gang boss Micofsky, and plaintiff's fellow longshoremen were aware of the ladder rungs prior to the accident. This knowledge was gained from previous warnings by the shipowner and by their substantial prior experience on board the POKKINEN and her sister ships which had similar designs.

Over a 10-15 year period, the warnings provided by the shipowner to the stevedore had proven sufficient to permit experienced longshoremen to perform their duties safely, and the shipowner had no reason to believe anything further was necessary on December 30, 1986. In fact, the lower court found that the shipowner met this "primary" or "initial" duty by providing an appropriate warning of this condition. The lower court stated in the "Discussion" portion of its Opinion, "[i]t had warned the stevedoring company previously about the situation. Normally this would be sufficient to preclude liability on its part". (7a)

Unfortunately, the stevedore and plaintiff's co-workers did not impart that warning to plaintiff Callen, a temporary-replacement employee, which led to plaintiff's accident. Although the lower court concluded that the shipowner's warning to the stevedore was proper and adequate, the lower court imposed liability on the defendants because of the stevedore's negligence in failing to relay that warning to all of its employees, and because of the defendants' failure to supervise the manner in which the stevedore carried out its cargo operation. The court specifically stated that, "[g]ranted that this defect had been disclosed by the vessel to the

stevedore. This warning, however, had been made at some indefinite time in the past and had been made to the stevedore and not to the longshoremen." (9a).

This holding is in direct conflict with the Ninth Circuit Court of Appeal's decision in *Bjaranson v. Botelho Shipping Corp.*, 1989 A.M.C. 381 (9th Cir. 1988). In that case, the plaintiff was injured while trying to descend a "coaming ladder" along the side of the No.2 hatch. Apparently there was no handhold for the ladder and the ladder terminated two or three feet below the top of the hatch. Plaintiff claimed that the defendant vessel owner "was negligent in failing to provide a coaming ladder with a handhold or handrails, and in failing to provide a safe means of access to the No. 1 hatch." *Id.* at 383. A jury determined that the vessel was negligent. On appeal, the Court of Appeals determined that there was insufficient evidence to support a finding that the defendant vessel owner breached any of the limited duties set forth in §905(b) of the Longshore and Harbor Worker's Compensation Act. The court held that the vessel owner could not be found to have breached the duty to warn since the stevedoring contractor was aware of the condition. The court specifically held that a vessel owner does not have a duty to warn individual longshoremen about dangerous conditions. The court said:

> The condition of the ladder was apparent and obvious when Bjaranson's employer, the stevedoring contractor, boarded the ship and assumed the control of the cargo operation. Although the condition may not have been obvious to Bjaranson at night, the fact that the condition was obvious to his employer eliminated whatever duty there may have been upon Botelho to warn the individual employees. See, generally, *Gulf Oil Corp. v. Bivins,* 276 F.2d 753, 758 (5 Cir.) (applying Restatement of Torts sec. 343 (1934)), cert. denied, 364 U.S. 906 (1960).

> Indeed, to conclude otherwise would result in the "creation of a shipowner's duty to oversee the stevedore's activity and insure the safety of longshoremen [that] would . . . saddle the shipowner with precisely the sort of nondelegable duty that Congress sought to eliminate by amending section 905(b)." *Hurst v. Triad Shipping Co.,* 1977 AMC 1625, 1643, 554 F.2d 1237, 1250 n.35 (3 Cir.), cert. denied, 434 U.S. 861, 1978 AMC 1896 (1977); see also *Scindia,* 451 U.S. at 169-70, 1981 AMC at 612 (describing "the rightful expectation of the vessel that the stevedore would perform his task properly without supervision by the ship").

Id. at 388 n.7.

The decision of the district court in the present case, which was affirmed by the Third Circuit Court of Appeals, is in direct conflict with the decision in *Bjaranson,* which petitioners assert is the proper interpretation of a vessel owner's duties under the Longshore and Harbor Worker's Compensation Act. If the decision in this case is not reversed, a vessel owner would be required to interview each of the stevedore's employees-longshoremen to ascertain whether their supervisors had imparted to them all instructions and warnings necessary for them to safely conduct their work; reimposing on the vessel owner a duty to supervise the work of the stevedore and its longshoremen, a result contrary to the purpose and intent of the Longshore and Harbor Worker's Compensation Act, as well as the holding of this court in *Scindia.*

It is well recognized that the shipowner can rely upon the stevedore to avoid exposing the longshoremen to hazards. "Section 41 of the Act, 33 U.S.C. Section 941, requires the stevedore, the longshoremen's employer, to provide a 'reasonably safe' place to work and to take such safeguards with respect to equipment and working conditions as . . . may . . . be necessary to avoid

injury to longshoremen." *Scindia,* 451 U.S. 156, 170. *Scindia* also established that the shipowner has no general duty to supervise or inspect the cargo operations and "is entitled to rely on the stevedore, to guard against hazards to its employees. . . ." 451 U.S. 156, 174; *Derr,* 835 F.2d 490, 493.

As correctly noted in the lower court's opinion in the present case, a shipowner may be required under certain limited circumstances during the course of the stevedore's operation to intervene to correct or remedy a dangerous condition. According to this Court's decision in *Scindia,* if the judgment of the stevedore to proceed with the cargo operation despite the hazard is "so obviously improvident that [the shipowner], if it knew of the defect and that [the stevedore] was continuing to [work], should have realized [the condition] presented an unreasonable risk of harm to the longshoremen, and that in such circumstances it had a duty to intervene and [remedy the condition]." *Scindia,* 451 U.S. 156, 175-176. Thus, the duty to intervene applies only to those limited situations when: (1) the stevedore is proceeding in an obviously improvident manner; and (2) the shipowner knew that the stevedore was proceeding in such an obviously improvident manner.

In the instant case, although the stevedore admittedly exercised bad judgment, there was no evidence that the defendants had actual knowledge of the stevedore's bad judgment. The stevedore had discharged the same cargo from the POKKINEN and her sister ships in a similar manner without incident for the past 10-15 years. Unless the shipowner was required to supervise the work of the longshoremen, contrary to the expressed purpose of the 1972 Amendments and the holding of this Court in *Scindia,* the shipowner would not have known that the stevedore failed to impart the warning about the ladder to one of its temporary employees.

Accordingly, unless the shipowner is going to be placed in the position of supervising the work of the

longshoremen, there is no basis in the law to impute the "poor judgment" of the stevedore to the shipowner. Imposing liability upon the vessel owners based upon the stevedore's "poor judgment" is contrary to the Longshore and Harbor Worker's Compensation Act, which specifically places the primary responsibility for the safety of the longshoremen on the stevedore.

In defining the shipowner's duty of care, this Court cited the decision of the Third Circuit Court of Appeals in *Hurst v. Triad Shipping Co.*, 554 F.2d 1237, 1249-50 n.35 (3d Cir. 1977), which held that placing responsibility on the shipowner for the conduct of the stevedore would be contrary to the purpose of the 1972 Amendments:

> [C]reation of a shipowner's duty to oversee the stevedore's activity and insure the safety of the longshoremen would . . . saddle the shipowner with precisely the sort of non-delegable duty that Congress sought to eliminate by amending Section 905(b).

Scindia, 451 U.S. at 169.

The lower court's opinion also seeks to reimpose a general duty on the shipowner to supervise the work of the longshoremen, and intervene whenever the stevedore makes a decision which could subsequently be considered "poor judgment." Again, this is precisely the type of duty and responsibility which the 1972 Amendments sought to eliminate. Accordingly, the decision of the district court is contrary to the Longshore and Harbor Worker's Compensation Act, and the decisions of this Court in *Scindia.*

CONCLUSION

Prior to the decision of the Third Circuit Court of Appeals which affirmed the holding of the lower court in the instant case, there was already a conflict among the circuits regarding the duty a shipowner owed to longshoremen under the 1972 Amendments. The Third Circuit Court's decision in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490 (3d Cir. 1988), *cert. denied,* 108 S.Ct. 1733 (1988), is admittedly in conflict with the Ninth Circuit Court's decision in *Turner v. Japan Lines, Ltd.*, 651 F.2d 1300 (9th Cir. 1981), *cert. denied,* 459 U.S. 967 (1982); and the Fifth Circuit Court's decision in *Woods v. Sammissa Co., Ltd.*, 873 F.2d 842 (5th Cir. 1987), *cert. denied,* 110 S.Ct. 853 (1990).[2] The Third Circuit Court's decision in the instant case, which is in conflict with the Ninth Circuit Court's decision in *Bjaranson v. Botelho Shipping Corp.*, 1989 A.M.C. 381 (9th Cir. 1988), only adds to the confusion facing shipowners. One of the specific purposes of enacting the 1972 Amendments was to promote safety on the waterfront by defining the respective duties and responsibilities of shipowners and stevedores. Because of the conflicts in the circuits, shipowners and stevedores are faced with the dilemma of having duties and responsibilities varying from port to port in the United States. This lack of uniformity not only fails to promote safety on the waterfront, but encourages inadequate supervision and control of the longshoremen.

For the foregoing reasons, petitioners respectfuly request This Honorable Court to issue a Writ of Certiorari to review the decision of the Court below and to review the conflict which has developed among the Circuits regarding the duty owed by shipowners to the

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2. The Chief Justice, Justice White and Justice Kennedy filed a dissent stating that they would grant certiorari in light of the conflict among the circuits regarding a shipowner's duty of care.

employees of independent stevedoring contractors hired to discharge and/or load cargo from their vessels.

Respectfully submitted,

Carl D. Buchholz, III
RAWLE & HENDERSON
Attorneys for Petitioners,
Oulo O/Y and OY Finnlines, Ltd.
211 South Broad Street
Philadelphia, PA 19107
(215) 875-4000